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**IN THE SUPREME COURT
STATE OF ARIZONA**

IN THE MATTER OF:)	Supreme Court No. R-17-0027
)	
PETITION TO MODIFY RULE 15.1 AND)	Comment of the Task Force on Court
RULE 15.4, ARIZONA RULES OF)	Management of Digital Evidence re:
CRIMINAL PROCEDURE)	Petition to Modify Rule 15.1 and Rule 15.4,
_____)	Arizona Rules of Criminal Procedure

The Task Force on Court Management of Digital Evidence (“Task Force”) provides this comment addressing Petition R-17-0027, which recommends changes to Arizona Rules of Criminal Procedure 15.1 and 15.4. This comment provides background of the Task Force and its work, its consideration of the petition, and comments and a summary of some supporting rationale for the alternative responses set forth below.

I. BACKGROUND.

Established on December 6, 2016, by Arizona Supreme Court Administrative Order 2016-129, the Task Force was asked to review five policy questions regarding court management of digital evidence and to make recommendations on each. The policy questions were:

1. Should court digital evidence be stored locally, offsite, or using cloud services and how long and in what manner should such evidence be retained?
2. Should management of court digital evidence be centralized or decentralized considering technology costs, expertise, and infrastructure necessary to manage it?
3. Should court rules governing public records be revised to address access and privacy concerns, including for victims,

non-victim witnesses, and other identifying information often included in video evidence?

4. Should new or amended rules on chain of custody evidence be developed for handling court digital evidence?
5. Should standardized acceptable formats, viewing, storage, preservation, and conversion formats or technical protocols for digital evidence be adopted for all courts?

The administrative order cites to the Joint Technology Committee Resource Bulletin: Managing Digital Evidence in the Courts (*Bulletin*) as providing “a good framework for discussion and relevant policy development.” That *Bulletin* is a February 2016 publication of the Joint Technology Committee established by the Conference of State Court Administrators, the National Association for Court Management, and the National Center for State Courts. The Task Force used the *Bulletin* as a key reference in its work.

Throughout 2017, the Task Force met to consider these issues. As directed by the administrative order, the Task Force submitted its report and recommendations to the Arizona Judicial Council by October 1, 2017. The Report and Recommendations of the Arizona Task Force on Court Management of Digital Evidence (*Report*), along with other Task Force information, can be found at the Task Force’s webpage: <http://www.azcourts.gov/cscommittees/Digital-Evidence-Task-Force>. The administrative order also directs the Task Force to file any corresponding rule change petition not later than January 10, 2018, which is a work in progress at this time, and further directs that the Task Force will remain in place until July 31, 2018.

On January 10, 2017, the Maricopa County Attorney’s Office filed Rule Change Petition R-17-0027, seeking to amend (1) Arizona Rule of Criminal Procedure 15.1 to “provide additional time for the disclosure of [law enforcement] officer body worn camera videos” and (2) Arizona Rule of Criminal Procedure 15.4 “to prevent the public from obtaining victim identifying information when it was mistakenly disclosed” and to “provide clear direction to counsel who

inadvertently received that information.” [Petition R-17-0027 at 2, 7] Various comments were filed with the Arizona Supreme Court in response to the petition. In an order dated August 31, 2017, the Arizona Supreme Court noted the filing of the petition and comments that had been received as of that time and (1) continued consideration of the petition; (2) extended the period for public comment until October 1, 2017, (although no additional comments were filed during that extended period); and (3) “refer[red] the matter to the Court’s Digital Evidence Task Force for consideration.” [Order at 1]

The Task Force deferred consideration of the petition until after October 1, 2017, when the *Report* was completed and could be used as a reference point. In addition, the public comment period for the petition closed October 1, 2017, and the Task Force could consider all comments filed with the Arizona Supreme Court addressing the petition. The Task Force then took action so that this comment could be filed sufficiently in advance of the Arizona Supreme Court’s December 11, 2017, Rules Agenda.

The Task Force referred initial consideration of the petition and comments to the Rules Workgroup of the Task Force, which previously had been established as more fully described in the *Report*. The Rules Workgroup considered these materials and met and made recommendations for the Task Force as a whole to consider. The Task Force as a whole met on November 15, 2017, to consider the Rules Workgroup recommendations and to discuss an approach to this comment, a draft version of which (without substantive language) had been circulated before that meeting. After the November 15, 2017, Task Force meeting, this comment was revised, circulated to the Task Force members in draft form, input was obtained from Task Force members, and this comment was then finalized for filing.

II. THE MODIFICATIONS PROPOSED BY THE PETITION.

The petition proposes three modifications to the Arizona Rules of Criminal Procedure:

(1) adding, to the information the prosecutor shall make available to the defendant in a felony prosecution under Arizona Rule of Criminal Procedure 15.1(b), a new category specifying “a list of all police officers who created any body worn camera video during the investigation of the case;”

(2) specifying, in Arizona Rule of Criminal Procedure 15.1(e), that for body worn camera video, “unless redacted copies of the videos are provided to the defense sooner, within 30 days of a written request, the prosecutor shall make arrangements for defense counsel, advisory counsel, or a defense investigator to view unredacted versions of the videos” and “[w]ithin 90 days of a written request and no more¹] than 7 days before trial, whichever is sooner, the prosecutor shall provide redacted copies of the videos to the defense;” and

(3) adding, in Arizona Rule of Criminal Procedure 15.4(d), additional specificity that material disclosed under that rule is to be used only for litigation of the criminal case and not to be distributed or disseminated in any other forum absent a court order and imposing obligations on a party that received confidential or otherwise protected information to immediately notify opposing counsel and return the disclosure and not memorialize, copy, or distribute such information absent a court order.

III. COMMENT BY THE TASK FORCE.

In considering the petition, the Task Force identified some areas of consensus, particularly with the changes in technology that appear to have prompted the petition, which are set forth in this comment. The Task Force did not, however, reach unanimous support or consensus for a single specific response to the changes proposed in the petition. Instead, Task Force members arrived at four alternative responses to the specific changes proposed in the petition. Along with providing the points of consensus, this comment sets forth these four alternative responses, their general level

¹ As noted in another comment filed in response to the petition, this appears to be a typographical error and apparently is intended to read “no *less* than 7 days before trial.”

of support within the Task Force, and a summary of some supporting rationale for each alternative response.

a. Task Force Points of Consensus.

Many of the Task Force points of consensus provided here in response to the petition are reflected in the *Report*. Quoting from the *Bulletin*, the *Report* begins by noting [at 3] that “[c]ourt management systems are not currently designed to manage large quantities of digital evidence, which means that courts and industry must find creative ways to deal immediately with the dramatically increasing volume of digital evidence, while planning for and developing new capabilities.” This concern and call to action in the *Bulletin* is consistent with making sure that procedural rules account for changes in technology, an issue that appears to be a primary reason for the filing of the petition.

As noted in the *Report* [at 21], the Task Force agrees that “the rapid increase in offering digital evidence in court is very real, particularly given the exponential growth in law enforcement body-worn cameras, digital video captured by cell phones, security cameras, and other digital media generated from Amazon Echo, Google Home, traffic control systems, and other devices that make up the Internet of Things.” The *Report* [at 3] notes that the very existence of the Task Force “is the result, in no small part, of the recent exponential growth of digital evidence used in court, from devices such as smart-device cameras, body-worn cameras, and other public and private surveillance equipment.” Of particular relevance here, the *Report* [at 11] observes that “body-worn camera use has expanded at an almost algebraic rate, and its use promises to continue to expand.” Similarly, the *Report* [at 3] adds that this advancement of technology necessitates the Task Force and courts “to address the unique challenges faced by courts in receiving, retrieving, accessing, formatting, converting, and retaining digital evidence.”

With respect to the increased use of body-worn camera images, the *Report* [at 27] states:

The most significant issue regarding digital evidence that may necessitate rule changes is volume. The volume of digital evidence will create the need for a significant increase in digital storage capacity and require additional time for redactions, such as that created by body-worn cameras and other footage captured on digital recording devices to protect victims' rights and privacy interests of citizens.

In addressing concerns about the use of body-worn camera images raised in the petition, the *Report* [at 33] observes:

It is not uncommon for victims to become increasingly concerned with privacy, especially as it related to images and information captured via digital devices like body-worn cameras, cell phone video, digital photographs of their injuries, crime scenes, and autopsies. Particular sensitivity surrounds the ability of the public to obtain this digital evidence through court filings, evidence received in court, and the record of court proceedings more generally.

Although suggesting that some rule changes were appropriate (an issue to be addressed in a subsequent rule change petition the Task Force anticipates filing in January 2018), the *Report* [at 28] noted that, in general, "the various rules of procedure revealed that current rules overall appear to be working when it comes to disclosure and submission of digital evidence for use at a hearing or trial." The *Report* did not suggest a rule change akin to what is sought in the petition.

Along with these statements in the *Report*, there is consensus in the Task Force that technology surrounding digital evidence is changing and evolving rapidly. In the ten months since the petition was filed, the use of body-worn cameras has increased and body-worn camera technology has changed and evolved. During Task Force meetings, the Maricopa County Attorney's Office reported that, in the first two months of 2017, agency personnel had spent 500 hours redacting body-worn camera video, with law enforcement agencies in Maricopa County using about 1,100 body-worn cameras. For the first ten months of 2017, the Maricopa County

Attorney's Office reported that it had received 4,602 hours of body-worn camera video and spent 3,081 hours redacting that video. During this same time period, law enforcement agencies (including the Phoenix Police Department) have been considering the expanded use of body-worn cameras.

The issues surrounding disclosure and use of body-worn camera images in court proceedings will continue to increase for the foreseeable future. The changes in technology suggest that, while technology has created the concerns that resulted in the filing of the petition, changes in technology (including continued development and refinement of redaction software) may resolve those concerns in the future. The Task Force recognizes, however, that such technology currently does not exist in a form that is readily accessible for use in Arizona. Accordingly, although technology may provide a solution in the future, it does not provide a solution at present.

b. Alternative Comments to the Petition by Task Force Members.

Apart from the general points of consensus listed above, the Task Force had no unanimous support or general consensus for a single, specific recommendation in response to the petition. In addition, a few Task Force members either took no position or abstained. As a result, for Task Force members taking a position, there were four alternative responses that had some support. Those responses, their general level of support within the Task Force, and a summary of some supporting rationale for the responses are as follows.

i. Exceeding the Scope of the Charge of the Task Force.

At least one Task Force member raised the issue of whether providing a comment in response to the petition exceeded the scope of the charge for the Task Force. Although noting the Arizona Supreme Court referred the petition to the Task Force for consideration, the concern was that Administrative Order 2016-129, which established the Task Force, charges the group to

address court management of digital evidence after it crosses the threshold from parties to the court. The petition, by contrast, addresses how parties should provide disclosure of and use body-worn camera video before it crosses the threshold from party to the court (and regardless of whether it ever does cross that threshold). The focus of the petition is the procedural rules regarding disclosure and use of body-worn camera video that may never be marked as an exhibit or offered or received in evidence by the court and that no party may ever intend be used in such a fashion—issues that are somewhat different than court management of digital evidence.

ii. Additional Time to Comment on the Petition.

At least one Task Force member suggested that having additional time to consider the petition would be helpful. Although noting the substantial increase in body-worn camera video, the reasons for this suggestion include the comparatively short period of time that the Task Force has been able to consider the petition, the complexity and importance of the issues raised in the petition, and the change in technology during the time the petition has been pending.

iii. There Is No Need to Make the Changes Requested in the Petition.

A plurality of Task Force members suggested that there is no need to make the changes requested in the petition. Various reasons for this suggestion were offered. Those reasons include that the current rules adequately address the issues involved with body-worn camera video; that the current rules allow the State to request an order providing for more time to disclose such video; that the percentage of cases implicating the issues raised in the petition are a small subset of all cases involving body-worn camera video; that the issues that prompted the filing of the petition may be resolved in the near future by advances in technology; that the changes requested in the petition may be premature given how fast technology is changing and for at least some of the

reasons set forth in the comments filed by others opposing adoption of the changes requested in the petition.

iv. There Is a Need to Make the Changes Requested in the Petition, Either as Requested or as Modified.

A smaller plurality of the Task Force members suggested that there is a need to make the changes requested in the petition, either as requested or as modified.² Various reasons for this suggestion were offered. Those reasons include that the time required for redaction of body-worn camera video will only continue to increase given the significant increase in the volume of such evidence; protecting victims' rights and avoiding inadvertent disclosure are important objectives, noting a victim has the right to recover damages from a governmental entity responsible for the intentional, knowing, or grossly negligent violation of the victim's rights, A.R.S. § 13-4437(B); leaving the rules unchanged will implicate the filing of numerous motions for additional time for disclosure, which will result in the need for additional time by parties and the court, thereby reducing efficiency and undercutting the goal of disclosures occurring without court hearings or orders; and that the petition suggests a uniform rule to apply in all cases without court involvement.

IV. CONCLUSION

The Task Force on Court Management of Digital Evidence clearly recognizes the dramatic increase of digital evidence (including body-worn cameras) in litigation of all sorts, including criminal cases. There is substantial need to ensure that procedural rules properly account for digital evidence, both before and after it crosses the threshold from the parties to the court. The Task Force offers the topics of consensus, as well as the alternative comments, set forth above,

² A modification, suggested by at least one Task Force member, was to make the changes requested in the petition but to add that, if the State failed to disclose the body-worn camera video within 90 days, the video would be precluded (or some other similar significant sanction imposed), absent good cause shown for the failure.

recognizing the Task Force members did not reach unanimous support or consensus for a single specific response to the proposed changes requested in the petition. Without question, digital evidence will continue to have a large and growing role in litigation for the foreseeable future. The Task Force appreciates the opportunity to consider this issue and provide this comment in response to the petition.

RESPECTFULLY SUBMITTED this 22nd day of November 2017.

___/s/ *Samuel A. Thumma*_____

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Digital Evidence

Electronic copy filed with the
Clerk of the Supreme Court of Arizona
this 22nd day of November, 2017.

by: ___/s/ *Jennifer R. Albright*_____